Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
CLERK

80-2004
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

290 MADISON CORPORATION, JAMES DELANEY and HELEN DELANEY,

Petitioners,

vs.

CARMINE E. CAPONE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has an unconstitutional "taking" of private property without just compensation and a deprivation of due process occurred when local governmental officials have (a) imposed arbitrary, impulsive and capricious rent controls; (b) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial and economic use of his property and (c) denied the property owner of an effective hearing in the application of such rent controls.

2. Does a property owner's relative economic worth and his ability to draw upon other funds to defeat a foreclosure action act as a bar in establishing the necessary proximate cause against local governmental officials in a Section 1983 Civil Rights action for the deprivation of his property?

3. Should this Court's rejection of the principle of qualified governmental immunity for municipal entities in section 1983 actions, as enunciated in *Owen v. City of Independence, Missouri*, —U.S.—, 63 L.Ed.2d 673, 100 S. Ct. ___ (1980), be extended to include individual municipal officials, who, while acting under a badge of local authority, collectively misused that authority by knowingly depriving an individual of his constitutionally protected property rights?

4. Whether the doctrine of *res judicata* operates as a bar to a federal action pursuant to 42 U.S.C., Section 1983 due to a prior state court suit which did not result in a final judgment on the merits and which did not address the elements of the Section 1983 claim.

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Petitioners, 290 Madison Corporation, James Delaney and Helen Delaney pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on February 27, 1981 (Court of Appeals Opinion, infra, p.A5).

OPINIONS BELOW

The opinion of the Court of Appeals is included in the Appendix beginning at page A8 and is reported at 642 F.2d 57. The Opinion of the United States District Court for the District of New Jersey is included in the Appendix at page A15 and is reported at 485 F. Supp. 1348.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1981. The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1) (1966).

STATUTE INVOLVED

The revelant portion of 42 U.S.C., Section 1983 (1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

James and Helen Delaney, t/a 290 Madison Corporation, the petitioners, are landlords in the City of Orange, New Jersey, who brought this action pursuant to 42 U.S.C., Section 1983 to redress the deprivation of their constitutionally protected property rights by defendants who acted under color of state law. Defendants are various past and present members of the City of Orange's Rent Leveling Board, City Council and the Mayor, who regulated the rents petitioners were permitted to charge tenants in their apartment building in such a manner to cause petitioners to suffer an economic deprivation resulting in the loss of their building through foreclosure.

In 1972, the City of Orange passed a Rent Leveling Ordinance which limited landlords to an annual four percent (4%) increase in rent and a tax surcharge. However, the Rent Leveling Board would grant applications for 4% rent increases only if the landlord in question was found to be in "substantial compliance" with state and local housing codes. The standard of compliance was shown to be a highly subjective one throughout the trial in the district court below.

Due to soaring fuel and operating costs, brought about in part by the Arab Oil Embargo of that year, petitioners served notice that the four percent (4%) increase permitted under the ordinance was being applied for, to become effective June 1, 1974, and notice was also served that the tax surcharge increase was likewise sought, to become effective August 1, 1974. The tenants immediately appealed to the Rent Leveling Board seeking to deny the increase and instead rollback the rents due to an alleged decrease in services and maintenance in the building. The 45 rental units of the building were inhabited by middle income, predominantly white collar,

some professional and a few retired individuals, who subsequently persuaded the local officials to characterize this same building, both in local hearings and in the press, as the equivalent of a slum tenement.

The Rent Leveling Board heard the tenants' appeal for the first time on July 9, 1974, at which time a hearing was held which resulted in utter "chaos". The uncontroverted evidence showed that the hearing was held by the defendants was one they themselves could not control. It resulted in angry tenants being given the opportunity to air their grievances but it denied the petitioners the opportunity to present documentation in support of their rental increase or to rebut the complaints of the tenants. The stormy session was continued until August 14, 1974, at which time the decision of the Rent Leveling Board was announced. With only one member voting and the remaining members abstaining, the Rent Leveling Board reduced the rents in all apartments by $20.00 per apartment, denied the 4% increase and denied the tax surcharge.

The petitioners appealed the Rent Leveling Board's decision to the Orange Board of Commissioners, as an appellate body, who then refused to hear the case in violation of their own local ordinance. Petitioners brought suit in state court to compel the Commissioners to act and the state court remanded the matter to the Commissioners, who, in turn, remanded the matter back to the Rent Leveling Board for a further hearing. The hearing was held in December of 1974 at which time petitioners were limited to ten (10) minutes to present their case and were once again interrupted by the angry shouts of organized tenants. The Rent Leveling Board thereafter reaffirmed its earlier decision denying the 4% increase, tax surcharge and rolled back the rents on all apartments. The Board further imposed a set of preconditions and inspection requirements before another application from the petitioners could be entertained.

On July 8th, 1975, after petitioners had expended substantial monies to meet the Rent Leveling Board's Pre-Conditions and Inspection Requirements, the Orange Property Maintenance Department certified that all of the alleged code violations that had existed in the petitioners' building had been abated and that the property substantially complied with its Property Maintenance Code. Accordingly, the Rent Leveling Board restored the $20.00 rollback but allowed only one 4% increase effective October 1, 1975. Notwithstanding the aforesaid ruling, the tenants appealed even this decision to the Board of Commissioners. As a result, the defendant Commissioners, decided that they themselves would conduct a reinspection of the premises, despite their legal obligation to act solely as an appellate body for the Rent Leveling Board and as such to consider only the evidence and record made before the Rent Leveling Board in reviewing the propriety of that Board's actions. Accordingly, in the presence of the news media and the tenants organization, but without notice to the petitioners, the defendant Commissioners as self-styled housing inspectors, conducted a "lighthearted junket throughout the building" as it was later reported in the local press. As a result, numerous on the spot edicts and fiats were issued by the defendant Commissioners to the press and the tenants, which only further confused the tenants' rental obligations. Moreover, the defendant Commissioners on the spot and in the absence of the petitioners, ordered an additional sixty (60) day rent freeze for the subject property.

During this period of time, the defendants in the instant case had even gone so far as to order the petitioners to use all collected rent monies for building repairs prior to making any mortgage payments. As a result of this Order, the rental rollback aforementioned,

and the denial of the 4% increase and tax surcharges aforementioned, the plaintiffs fell in arrears in their mortgage obligation. The mortgagee, The Independence Savings Bank of Brooklyn, instituted a foreclosure proceeding in the Superior Court of New Jersey, Chancery Division, in September of 1975. This foreclosure action was consolidated for trial, along with the two other state court actions previously filed by the petitioners in March of 1975. These two suits brought by the petitioners sought to have the actions of the Rent Leveling Board and the Board of Commissioners declared an inverse condemnation and an unconstitutional taking of property.

A judgment of foreclosure was entered against the property in April of 1977 by the Superior Court of New Jersey. The remaining two cases filed by the petitioners in the state court were disposed of upon Motion for Summary Judgment prior to the taking of evidence as to the issues involved. The state trial and Appellate Courts both found that as a matter of law there could be no cause of action for inverse condemnation of private property as a result of the actions of local officials in the Rent Leveling process. This legal opinion was arrived at despite the State Chancery Judge's opinion at the foreclosure trial that: "The practice (of the Rent Leveling Board) is the most arbitrary, highhanded, wild west type of operation in the 25 years that I have been in the practice of law that I have encountered." Therefore, petitioners' claim in the state court was never adjudicated on the merits, but rather was decided upon the issue of the liability of a governmental entity pursuant to the New Jersey Tort Claims Act.

Prior to the entry of final judgment in the state court action, petitioners filed the instant Complaint on August 13th, 1976, in the Federal District Court for the District of New Jersey. Petitioners brought their action under the Civil Rights Act, 42 U.S.C., Section 1983,

alleging that the individual defendants, acting in their official capacities and pursuant to state law, violated their constitutionally protected property rights and arbitrarily, capriciously and unlawfully regulated their rental income. Defendants' actions caused economic losses to petitioners, eventually resulting in the loss of their apartment building through foreclosure by the mortgagee. The case was tried to the district court, sitting without a jury, in September 1979. The district court Judge ruled that petitioners were not entitled to recover damages from the defendants and entered judgment for no cause of action in favor of the defendants, without costs. Petitioners appealed from the judgment of the district court, and defendants cross-appealed the failure of the district court to award them costs as prevailing parties. The Third Circuit Court of Appeals affirmed and filed its Opinion on February 27, 1981, concluding that the district court's findings of fact were not clearly erroneous and there was no reversible error in its rulings of law. The Circuit Court remanded the case to the District Court for an articulation of the basis for a denial of costs to the prevailing party. The district court subsequently articulated the basis for its earlier decision and affirmed its conclusion not to award the defendants costs.

REASONS FOR GRANTING THE WRIT

I

This case presents an important question of constitutional law which has not been, but should be, resolved by the Supreme Court. There is no decision of this Court directly on point nor have there been any Circuit Court cases which squarely faced the issue presented here. While the constitutionality of a Rent Control Ordinance is not challenged here, its application and effect is alleged to have constituted a "taking" without just compensation. In addition, the haphazard and arbitrary application of the Rent Control Ordinance in this case illustrates the procedural and substantive due process problems inherent in the application of any Rent Control Ordinance on the local level absent adequate guidelines and controls from the legislature or the courts.

The Just Compensation Clause of the Fifth Amendment states in clear and unequivocal terms: "(N)or shall private property be taken for public use, without just compensation." The question presented on the merits in this case is whether a governmental entity's exercise of its regulatory police power through Rent Control has amounted to a "taking" of "private property". In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L.Ed. 322, 43 S. Ct. 158 (1922), the Court articulated the general rule that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. The Court has frequently found that a "taking" may occur without a formal condemnation proceeding or transfer of fee simple in cases where government action benefiting the public resulted in destruction of the use and enjoyment of private property. See, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 62 L.Ed.2d 332, 100 S. Ct. 383 (1979); *Chicago, R.I. & P.R. Co. v.*

United States, 284 U.S. 80, 76 L.Ed. 177, 52 S. Ct. 87 (1931); *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 66 S. Ct. 1062 (1946).

Police power regulations such as zoning ordinances, rent control ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S. Ct. 2646, *reh. den.* 439 U.S. 883, 58 L.Ed.2d 198, 99 S. Ct. 226 (1978), this Court confronted the issue whether the restrictions which the New York City Landmark Preservation Law imposed upon the use of Grand Central Terminal effected a taking of property within the Fifth Amendment. Although this Court found that the application of the law did not effect a taking of the railroad's property, it did so only after deciding that the restrictions imposed did not interfere with the gainful and intended purpose and use of the railroad terminal. *Id.* at 136 and 138. This Court identified several factors which were present in past decisions for determining whether a taking had occurred. Among these were the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinctive investment-backed expectations. *Id.* at 124; See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S. Ct. 987 (1962). The Court emphasized that Penn Central was able to use the Terminal for its intended purposes and in a gainful fashion, *Id.* at 138, fn. 36, and that the law did not interfere with the present uses of the Terminal, *Id.* at 136. The effect of the regulation in *Penn Central* is directly opposite the effect of the Rent Leveling Board's actions in the instant case. Here, not only did the regulation interfere with petitioners' use of the premises, but it resulted in the loss of the building, loss

of petitioners' equity therein and loss of future investment income therefrom. For these reasons it is asserted that a "taking" has occurred.

A use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose. *Penn Central Transportation Co. v. New York City, supra,* at 127; *Nectow v. Cambridge,* 277 U.S. 183, 72 L.Ed. 842, 48 S. Ct. 447 (1928); See also *Moore v. East Cleveland,* 431 U.S. 494, 513-514, 52 L.Ed.2d 531, 97 S. Ct. 1932 (1977) (Stevens, J., concurring). A taking has also occurred if the regulation has an unduly harsh impact upon the owner's use of the property, *Penn Central Transportation Co. v. New York City, supra,* at 127, or where the regulation denies an owner economically viable use of his land. *Id.* at 138, n.36; *Agins v. Tiburon,* 447 U.S. 255, 260 65 L.Ed.2d 106, 100 S. Ct. —(1980). The fact that a regulatory "taking" may be temporary, by virtue of the governing body's power to rescind or amend the regulation does not make it any less of a constitutional "taking". The Court has held that temporary reversible "takings" should be analyzed in the same manner as irreversible takings. See *e.g., United States v. Causby,* supra. *Kimball Laundry Co. v. United States,* 338 U.S. 1, 93 L.Ed. 1765, 69 S. Ct. 1434 (1949); *United States v. Petty Motor Co.,* 327 U.S. 372, 90 L.Ed. 729, 66 S. Ct. 596 (1946) *reh. den.* 327 U.S. 818, 90 L.Ed. 1040, 66 S. Ct. 813.

The issue of whether a state must provide a monetary remedy to a landowner whose property has been "taken" by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment was left open by this Court in *Agins v. Tiburon, supra.* The Court again left the issue unresolved in *San Diego Gas & Electric Company v. City of San Diego,* 49 U.S.L.W. 4317 (March 24, 1981). Because the question of whether Rent Control may constitute a "taking" is one of first im-

pression and because of the unresolved collateral issue of monetary remedies, this case presents the opportunity for this Court to decide significant issues of constitutional law. The instant case also presents important issues of far reaching impact with regard to the due process concerns which must be followed in imposing any type of Rent Control.

The actions taken by the Rent Leveling Board in the regulation of petitioners' premises in the instant case were undertaken in such a manner as to deny petitioners' Due Process of Law. Petitioners do not here challenge the right of the State to regulate rental income. See *Inganmort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973). However, such regulation which would affect individual property rights requires minimal due process protections. The right to enjoy property without unlawful deprivation is no less than the right to speak or the right to travel and is in truth a personal right. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S. Ct. 1113 (1972).

The basic elements of procedural due process are notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80, 32 L.Ed.2d 556, 92 S. Ct. 1983 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L.Ed.2d 287, 90 S. Ct. 1011 (1970)); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S. Ct. 1820 (1969). The record below, uncontroverted and supported by the testimony of the defendants, is replete with instances wherein the petitioners were neither accorded an opportunity to be heard nor a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S. Ct. 1187 (1965). In addition, substantive due process requires that the regulation bear a substantial relationship to the public health, safety, morals or general welfare.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 395, 71 L.Ed. 303, 47 S. Ct. 114 (1926). No case exists as to the relevant standard to be applied when a rent control regulation is imposed. However, where the regulation is undertaken in a totally arbitrary and capricious manner, bearing no relationship to the general welfare, substantive due process has been denied. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974). In the instant case, the actions of the Rent Leveling Board, were performed with a wanton disregard of petitioners' rights and without any criteria for its actions. The record substantiates the fact that the Board acted impulsively and in an arbitrary and capricious manner.

Whether Rent Control can constitute a "taking" within the Fifth Amendment presents an important constitutional question which this Court has not previously addressed. In addition, important constitutional questions also exist as to the scope and substance of due process required under a Rent Control Ordinance, both as applied and enforced. Accordingly, it is respectfully urged that this Court review the aforesaid questions of constitutional first impression having widespread application to owners and tenants of residential rental properties throughout our cities.

II

The District Court was of the opinion that petitioners had failed to show that their injury was proximately caused by the acts of the defendants and that the actions of the defendants, if they had caused the petitioners' injury, constituted a legal wrong. In essence, the District Court found that petitioners could have prevented the foreclosure of the subject property, either by maintaining a larger equity in the property or by using their income

from other sources to subsidize the property. The district court improperly found that the foreclosure of the subject property was not the proximate result of the defendants' actions since petitioners had other independent resources which could have been used to provide monetary assistance to the building. This view considers whether the injured party has a "deep pocket" and can afford to absorb the losses heaped upon it by arbitrary regulation rather than the question of whether an injury has occurred. Would the district court hold that petitioners' injury was proximately caused by the defendants' conduct only when their own personal resources were exhausted?

Even if we assume *arguendo* that the petitioners might have been able to salvage their building from foreclosure by further subsidization of it with income from other sources, or by maintaining a larger equity, and even if the petitioners still owned the subject property today, there is no question that petitioners suffered substantially reduced rental income from the property as a direct and proximate result of defendants' actions. As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation and the self-executing character of the constitutional provision with respect to compensation is triggered. *United States v. Clarke*, 445 U.S. 253, 257, 63 L.Ed.2d 373, 100 S. Ct. 1127 (1980). The issue is not, as the district court has characterized it, whether the foreclosure was the proximate result of the wrongful actions of the defendants, but whether petitioners suffered significantly reduced rental income and/or foreclosure as a result of the defendants' actions. The question then becomes whether defendants' actions were within constitutional boundaries.

Whether the compensation to be provided for the "taking" must be a monetary remedy was left open in *Agins v. City of Tiburon, supra,* 447 U.S. at 263. This Court once again left the issue undecided in *San Diego Gas & Electric Co. v. City of San Diego,* supra. The present case affords the opportunity to answer these important questions of federal law.

III

The District Court concluded that the instant defendants are nonjudicial government officials who perform adjudicatory functions and who therefore are eligible to avail themselves of the protective umbrella of qualified immunity. By its terms, Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Patchtman,* 424 U.S. 409, 417, 47 L.Ed.2d 128, 96 S. Ct. 984 (1976). This Court, in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978) held that a local government may be sued under Section 1983 when execution of a government's policy or custom, whether made by its lawmakers, or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury upon an individual. *Monell* reserved decision on the question of whether local governments should be afforded some form of official immunity in Section 1983 suits. However, this Court in *Owen v. City of Independence, Missouri,* 48 U.S.L.W. 4389, — U.S. —, 63 L.Ed.2d 673, 100 S. Ct. — (April 16, 1980) resolved that question and held there was no qualified immunity for municipalities for their good-faith constitutional violations under Section 1983.

In the instant case, suit was filed prior to this Court's ruling in *Monell, supra,* and *Owen, supra,* thus defendants were not sued in their official capacity, but rather in their individual capacity, for wrongs perpe-

trated against petitioners while acting under color of state law. The recent decision of this Court in *Owen v. City of Independence, Missouri,* supra. clearly shows that there is no defense of qualified immunity available to a municipality. The defense of qualified immunity should not then be available to individual municipal officials who, while acting under a badge of municipal authority, misuse that authority by knowingly depriving individuals of their constitutionally protected rights. These very same municipal officials are the individuals who made the municipality's official policy, which municipality would not be allowed the defense of qualified immunity if suit were brought against it. The results of *Owen,* supra, and this Court's prior decision in *Wood v. Strickland,* 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) compel the result that municipal officials should not be allowed to raise the shield of qualified immunity merely because they have the badge of municipal authority in the execution of that policy which they themselves have promulgated and which policy effected the petitioner's injury. Any defense of qualified governmental immunity is intended to shelter only those officials who perform ministerial functions and who simply execute policy and not those officials who both formulate and execute same.

The record below is replete with instances which show the defendants' callous disregard for the rights of the petitioners. In addition, the administrative and appellate positions which the defendants were in clearly show that they knew or should have known of the impact of their actions upon petitioners' rights. It is submitted that the district court erred in allowing the defense of governmental immunity.

IV

The district court held that the instant action was barred by the principle of *res judicata* based upon the prior state court actions. While the doctrine is fully applicable to Section 1983 actions, *Preiser v. Rodriguez*, 411 U.S. 475, 497, 36 L.Ed.2d 439, 93 S. Ct. 1827 (1973), it is available only when the prior state action was adjudicated on the merits. *Houston v. United States*, 297 F.2d 838, 156 Ct. Cl. 38 (Ct. C. 1962), *cert. den.* 371 U.S. 815, 9 L. Ed. 2d 56, 83 S. Ct. 27; *Osadchy v. Gans*, 436 F. Supp. 677 (D. N. J. 1977).

The able district court Judge, the Honorable Lawrence A. Whipple, afforded the petitioners a full trial on the merits despite his conclusion that *res judicata* was dispositive of this case. In addition, Judge Whipple saw fit to address the merits of the case in his opinion, rather than allow his conclusion to control the matter. The above facts indicate that the district court Judge was of the opinion, at the time of trial, that the doctrine of *res judicata* did not apply.

Petitioners' prior state court actions never resulted in a final adjudication on the merits. Although there were three state court actions which were consolidated for trial, the foreclosure action was heard first and evidence and testimony was limited to the foreclosure matter. Following the entrance of the judgment of foreclosure, the state trial court granted defendants' Motion for Summary Judgment as a matter of law. The propriety of the defendants' actions with respect to petitioners' constitutionally protected property rights was never considered. Petitioners were prohibited from litigating their claims against defendants because the state court found that such a claim was not cognizable under New Jersey law. However, a cognizable claim does exist against the individual defendants under Section 1983 for an invasion

of petitioners' property rights. The prior state court actions cannot operate as a bar to the instant matter when the Section 1983 issues were not adjudicated on the merits or even addressed. For these reasons, it is asserted that the district court erred in applying the doctrine of *res judicata* to the instant federal action.

CONCLUSION

The instant case presents significant constitutional questions of far reaching impact which should be resolved by this Court. It is respectfully submitted that the Supreme Court grant Certiorari to the United States Court of Appeals for the Third Circuit to consider the novel and substantial issues presented relating to Rent Control and its impact upon the constitutionally protected property rights of land owners.

Respectfully submitted,

MAHONEY & MAHONEY, P.A.
A Professional Corporation
Attorneys for Petitioners

By: /s/ Anthony M. Mahoney
ANTHONY M. MAHONEY

ADDENDUM

APPENDIX A

LETTER OPINION DATED APRIL 28TH, 1981 OF THE HONORABLE LAWRENCE A. WHIPPLE, SENIOR JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ON REMAND

Anthony M. Mahoney, Esq.
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Attorney for Defendant, Capone

Alfonso C. Viscione, Esq.
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Attorney for Defendants, Members of the Orange Rent Leveling Board

Re: 290 Madison Corporation v.
Carmine E. Capone, et al.
Civil Action No. 76-1600

Gentlemen:

This action was commenced in this Court when plaintiffs, alleging that defendant city officials' unconstitutional

action caused the loss of an apartment building through foreclosure, brought suit under 42 U.S.C. § 1983 (1976). After a bench trial, judgment was entered in favor of defendants, with each party to bear his own costs. Subsequently, plaintiffs appealed from the district court's judgment, and defendants cross appealed the failure of the district court to award them costs as prevailing parties. The Court of Appeals for the Third Circuit affirmed the district court judgment in favor of defendants, but remanded the case to the district court for an articulation of the basis for the order denying costs. It is this issue which is now before this Court. Additionally, the Court will address defendants' motion for leave to file a verified Bill of Costs Nunc Pro tunc, pursuant to Fed.R.App.P. 39(e), Costs of Appeals Taxable in the District Court.

Fed.R.Civ.P. 54(d) provides in pertinent part that:

> Except where express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . .

No legislation exists which governs the award of costs in an action brought under 42 U.S.C. 1983. Nevertheless, this Court is guided in its determination of whether to award costs by the Civil rights Attorneys' Fees Act, 42 U.S.C. § 1988 (1976), and the cases which construe that statute.

42 U.S.C. § 1988 provides that in any action brought to enforce a provision of section 1983, "the Court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." It was the intent of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978). The Senate debates on § 1988 reveal that

Congress desired to make it easier for a plaintiff of limited means to bring meritorious suits. *Id.* at 420, *citing Grubbs v. Butz*, 548 F.2d 973, 975 (D.C. Cir. 1976). Consequently, Congress enacted § 1988 with the intention that a successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Senate Report No. 94-1011, reprinted in 5 U.S. CODE CONG. & ADMIN. NEWS p. 5912 (1976); *Mid Hudson Legal Services, Inc. v. G. & U., Inc.*, 578 F.2d 34, 37-38 (2d Cir. 1978).

In contrast, these policy considerations are not present when a defendant prevails in a civil rights action. *Christiansburg Garment Co. v. EEOC, supra* at 419. In enacting § 1988 Congress also intended to "deter the bringing of lawsuits without foundation by providing that the prevailing party—be it plaintiff or defandant—could obtain legal fees. *Grubbs v. Butz, supra* at 975. Thus, it is now well-established that a district court may, in its discretion, award attorneys' fees to a prevailing defandant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith. *Christiansburg Garment Co. v. EEOC, supra*, at 521; *Hughes v. Repko*, 578 F.2d 483, 489 (3d Cir. 1978); *Mid-Hudson Legal Services, Inc. v. G. & U., Inc.*, 578 F.2d 34, 37 (2d Cir. 1978).

These policy and equitable considerations bear on the award of costs in civil rights actions as well as attorneys' fees. The instant matter was not frivolous, vexatious, or without foundation. At all times plaintiffs were represented by counsel and proceeded under the advice of counsel. In fact, all pretrial motions to dismiss brought by defendants against plaintiffs were denied. the case proceeded to a verdict after fourteen days of trial, in the course of which various memoranda, including trial briefs

and proposed findings of fact and conclusions of law, were submitted.

This Court finds that the plaintiffs proceeded in good faith, and that the action was not brought to harass, embarrass, or abuse defendants. Accordingly, costs will not be awarded to defendants, This holding renders moot defendants' motion for leave to file a Bill of Costs, Nunc pro Tunc, pursuant to Fed.R.App.P. 39(e). Counsel for plaintiffs shall prepare an appropriate order within five (5) days.

Very truly yours,

/s/ Lawrence A. Whipple
LAWRENCE A. WHIPPLE,
U.S.D.J.

LAW:jap

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 27TH, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1776/80-1778

DELANEY, JAMES and HELEN DELANEY,
T/a 290 Madison Corporation

290 MADISON CORPORATION,
a New Jersey Corporation,
and JAMES DELANEY and HELEN DELANEY

vs.

CAPONE, CARMINE E., JAMES J. BROWN, RAYMOND M. CODEY, ANTHONY DELLA SALLA, ERNEST MONFILETTO, PATRICIA JULIANO, BENJAMIN F. JONES, MICHAEL MARUCCI, JOEL. L. SHAIN, QUINCY LUCARELLO, Past and Present Commissioners and Councilmembers of the City of Orange; EDWARD FERRARI, BEVERLY SAVAGE, MARION STEWART RALPH PERRELLA, KENNETH CONDON, FRANK M. PANNUCCI, JR., SEAN McCARTHY, R. FRANK CURRY, ARNOLD REITER, STANLEY ROBINSON, Past and Present Members of the Rent Leveling Board of the City of Orange; ESSEX COUNTY LEGAL SERVICES CORPORATION, and JOHN ATLAS

290 Madison Corporation and James
Delaney and Helen Delaney,

Appellants in No. 80-1776

EDWARD FERRARI, BEVERLY SAVAGE, MARION STEWART RALPH PERRELLA, KENNETH CONDON, FRANK M. PANNUCCI, JR., SEAN McCARTHY, R. FRANK CURRY, ARNOLD REITER, STANLEY ROBINSON, Past and Present Members of the Rent Leveling Board of the City of Orange,

Appellants in No. 80-1777

Carmine E. Capone, James J. Brown, Raymond M. Codey, Anthony Della Salla, Ernest Monfiletto, Patricia Juliano, Benjamin F. Jones, Michael Marucci, Joel L. Shain, Quincy Lucarello, Past and Present Members of the City of Orange Board of Commissioners and Councilmembers,

Appellants in No. 80-1778

(D.C. Civil No. 76-1600)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by the counsel on January 20, 1981.

JUDGMENT

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed March 21, 1980, be, and the same is hereby affirmed with respect to entry of judgment in favor of defendants; and the cause is remanded to the District Court with respect to the issue of costs for an articulation of the basis of that order, all in accordance with the opinion of this Court. In appeal No. 80-1776 costs taxed against appellants.

ATTEST:

SALLY MORRIS
Clerk

February 27, 1981

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 27, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1777 and 80-1778

JAMES DELANEY and HELEN DELANEY, t/a
290 Madison Corporation

290 MADISON CORPORATION,
a New Jersey Corporation, and
JAMES DELANEY AND HELEN DELANEY

v.

CAPONE, CARMINE E., JAMES J. BROWN, RAYMOND M. CODEY, ANTHONY DELLA SALLA, ERNEST MONFILETTO, PATRICIA JULIANO, BENJAMIN F. JONES, MICHAEL MARUCCI, JOEL L. SHAIN, QUINCY LUCARELLO, Past and Present Commissioners and Councilmembers of the city of Orange; EDWARD FERRARI, BEVERLY SAVAGE, MARION STEWART, RALPH PERRELLA, KENNETH CONDON, FRANK M. PANNUCCI, JR., SEAN McCARTHY R. FRANK CURRY, ARNOLD REITER, STANLEY ROBINSON, Past and Present Members of the Rent Leveling Board of the City of Orange; ESSEX COUNTY LEGAL SERVICES CORPORATION, and JOHN ATLAS

290 Madison Corporation and
James Delaney and Helen Delaney,
Appellants in 80-1776

Edward Ferrari, Beverly Savage, Marion Stewart, Ralph Perrella, Kenneth Condon, Frank M. Pannucci, Jr., Sean McCarthy, R. Frank Curry, Arnold Reiter, Stanley Robinson, Past and Present Members of the Rent Leveling Board of the City of Orange,

Appellants in 80-1777

Carmine E. Capone, James J. Brown, Raymond M. Codey, Anthony Della Salla, Ernest Monfiletto, Patricia Juliano, Benjamin F. Jones, Michael Marucci, Joel L. Shain, Quincy Lucarello, Past and Present Members of the City of Orange Board of Commissioners and Councilmembers,

Appellants in 80-1778

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 76-1600)

Argued January 20, 1981

Before: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*.

(Filed February 27, 1981)

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Attorney for Appellants in No. 80-1778

(Opinion Starts on Page A11)

OPINION OF THE COURT

PER CURIAM:

Alleging that unconstitutional actions of the defandant city officials caused the loss of an apartment building through foreclosure, the plaintiffs brought suit under 42 U.S.C. §1983 (1976). Their principal contention was that the income from the building was reduced, and the building itself eventually lost, through the actions of a rent leveling board created by a city ordinance. Inverse condemnation challenges to the constitutionality of the rent control regulation in the New Jersey state courts were unsuccessful, and the plaintiff's building was finally sold in a mortgage foreclosure proceeding.

After a bench trial, the district court found that res judicata barred consideration of the federal claim, since it was indistinguishable from the prior state actions. The court further found that even if res judicata was not dispositive, the plaintiffs had failed to establish that the loss of the building was proximately caused by the regulatory acts of the city officials. Although rent control reduced the income from the property, the court found the plaintiffs had chosen to maintain a thin equity in the building and did not meet the mortgage payments. In addition, the court concluded that the proceedings before the board comported with due process and that there was adequate cause to support the board's orders. Moreover, the court found that the defendant officials had established their claim to qualified immunity.

The plaintiffs have appealed from the judgment of the district court, and the defendants have cross-appealed the failure of the district court to award them costs as prevailing parties.

We have reviewed the plaintiffs' briefs and considered the contentions they raised at oral argument. We con-

clude that the district court's findings of fact are not clearly erroneous, and we perceive no reversible error in its rulings of law. Accordingly, the judgment in favor of the defendants will be affirmed.

The district court directed that "each party to the suit is to bear its own costs," but did not disclose its reasons for that action. Normally costs are allowed as a matter of course to the prevailing party, although the court may direct otherwise. *See* Fed. R. Civ. P. 54(d). In *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 662, 664-65 (3d Cir. 1975), we said that when the district court determines that a prevailing party is not entitled to costs, there should be an explanation entered on the record. *See also Samuel v. University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976).

Although the decision to deny costs is largely a matter of discretion, an articulation of the basis for the order is necessary for purposes of appellate review. Of course, we express no view as to whether costs should be awarded in this case.

Accordingly, the case will be remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:
Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX "D"

JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 21, 1980

This matter having come before the Court for a trial of issues raised by the plaintiffs as owners of certain real estate on which was situated a multiple dwelling apartment house and garages, located at 466 Highland Avenue, Orange, Essex County, New Jersey, for alleged violations of the Civil Rights Act (42 U.S.C. §1983) by the named defendants, all elected officials of the City of Orange, and members of the Orange Rent Leveling Board;

And, the trial of this matter, without a jury, commenced on September 4, 1979 and proceeded through September 26, 1979;

And, this Court having heard and evaluated the testimony of witnesses, and having read and evaluated the documents and records admitted into evidence, and having reviewed the pleadings and the Orders entered during the Pretrial stages of these proceedings, and the Court's notes of the trial, as well as the Trial Briefs, Post-Trial Memoranda, and the proposed Findings of Fact and Conclusions of Law submitted at the conclusion of the trial by the attorneys for the parties, and having given due regard and consideration of all of the foregoing;

And, this Court having written an Opinion containing Findings of Fact and Conclusions of Law, which are incorporated herein by reference, dated March 11, 1980, and having filed said Opinion with the Clerk of this

Court on March 12, 1980, and having mailed copies of said Opinion to the attorneys for all parties in this matter simultaneously therewith;

It is *ADJUDGED* and *ORDERED* this 21st day of March, 1980, that:

(1) Judgment be and hereby is granted in favor of the defendants and against the plaintiffs;

(2) Each party to the suit is to bear its own costs.

/s/ Lawrence A. Whipple

LAWRENCE A. WHIPPLE,
J.U.S.D.C.

APPENDIX "E"

OPINION OF THE HONORABLE LAWRENCE A. WHIPPLE, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 12, 1980

APPEARANCES:

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Attorney for Defendants Capone et al.

Alfonso C. Viscione, Esq.
285 Main Street
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Attorney for Defendant Members
of Rent Leveling Board of the City
of Orange

WHIPPLE, *Senior Judge*.

This is an action brought under the Civil Rights Act, 42 U.S.C. § 1983, to redress alleged vilations of plaintiffs' constitutional rights by defendant officials of the City of Orange, New Jersey. Plaintiffs are landlords in the City of Orange. Their complaint alleges that defendants, members of the city's Rent Leveling Board, members of the City Council and the Mayor, acting either conspiratorily or separately, violated their constitution-

ally-protected property rights by arbitrarily, capriciously and unlawfully regulating the rents plaintiffs were permitted to charge tenants in one of their apartment buildings. Plaintiffs alleged that defendants' actions caused economic losses to plaintiffs, eventually resulting in the loss of their apartment building through mortgage foreclosure. Plaintiffs seek compensatory and punitive damages, attorneys' fees and costs.

The case was tried to the Court, sitting without a jury, in September 1979. The parties submitted trial briefs, post-trial memoranda and proposed findings of fact and conclusions of law. After careful review of all testimony, exhibits, memoranda and oral argument the Court hereby adopts the following findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).

FINDINGS OF FACT

Plaintiffs James and Helen Delaney are engaged in the business of purchasing apartment buildings and renting out the individual units. In connection with their business the Delaneys have created corporations to hold title to their properties. One such corporation, wholly owned by the Delaneys, is plaintiff 290 Madison Corporation (hereinafter referred to as "the corporation").

In 1968 the corporation purchased an apartment building located at 466 Highland Avenue in Orange, New Jersey. The purchase price was $385,000. The Delaneys "loaned" to the corporation approximately $75,000 for the purchase. The corporation assumed the seller's second mortgage in the amount of $55,000.

In 1972 the property was re-mortgaged to the Independence Savings Bank of Brooklyn, New York for $350,000. The corporation paid off the original first and second mortgages in full with the proceeds of the new mortgage. The balance, approximately $62,000, was re-

mitted to the corporation. This sum was then withdrawn from the corporation by Helen Delaney, purportedly as partial repayment of the $75,000 which she and James Delaney had loaned to the corporation in 1968 for the purchase of the property. Thus the corporation was left with virtually no cash and an apartment building with a mortgage indebtedness in the amount of $350,000. The corporation may fairly be described as an owner with extremely "thin" equity in the apartment building.

On November 1, 1972 the corporation conveyed the 466 Highland Avenue property to the Delaneys without consideration. The mortgagee was apparently not advised of this transfer. The corporation remained liable on the mortgage note.

On November 10, 1972 the City Council of the City of Orange passed an ordinance (hereinafter referred to as the "Rent Leveling Ordinance") which created the Orange Rent Leveling Board (hereinafter "RLB") and established procedures regulating rents on certain properties. The ordinance was amended eleven times thereafter. As applied to multiple unit dwellings like 466 Highland Avenue, the ordinance provided that landlords could apply to the RLB for 4% rent increases which the RLB would grant unless the landlord in question were found not to be in substantial compliance with state and local housing codes.[1] It is the defendants' application of the ordinance to plaintiffs' property which is the predicate for the instant complaint.

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1. The provision of the Orange Rent Leveling Ordinance which conditioned 4% rent increases on a finding that the landlord was in substantial compliance with state and local housing codes was in 1977 declared by a New Jersey state court to be an invalid exercise of municipal power, under the authority of Modular Concepts, Inc. v. South Brunswick Township, 146 N.J. Super. 138 (App. Div. 1977). However, that declaration of invalidity does not affect this Court's analysis or conclusions. *See* text at p. 10 *infra*.

Beginning in 1973 tenants of the Highland Avenue building began to complain about the condition of the premises and the services (or lack thereof) provided by plaintiffs'. The complaints culminated in a rent strike.

In April 1974 the corporation notified the tenants that it was seeking a 4% rent increase as allowed by the Rent Leveling Ordinance. The tenants appealed to the RLB, seeking that it deny the increase and instead roll back the rents due to an alleged decrease in services and maintenance in the building. The allegations pertaining to the property were substantiated by a report of city housing inspectors enforcing the state and local housing codes. The report was released on June 3, 1974 and contained a list of 124 code violations.

The RLB heard the tenants' appeal for the first time on July 9, 1974, and this hearing was continued on August 13, 1974. Plaintiffs, the Delaneys, presented their views at both meetings, although the presence of angry tenants rendered the sessions somewhat stormy. On August 14, 1974, the RLB by resolution denied the 4% increase and rolled back the rents $20.00 per apartment per month. The resolution, although passed with only a single member voting, was made in accordance with the RLB's own parlimentary rules of procedure.

The plaintiffs appealed the RLB's decision to the Commissioners of the City of Orange. The Commission functioned as an appellate tribunal from decisions of the RLB. The Commission refused to hear the case. Plaintiffs Delaneys sued in state court to compel the Commission to act. The state court remanded the matter to the Commission, which in turn remanded it to the RLB for a further hearing. This hearing was held in November 1974. Both the tenants and plaintiffs Delaneys testified. The RLB thereafter reaffirmed its earlier decision denying the 4% increase and rolling back the rents on all apartments.

In March 1975 the Delaneys filed a second suit in state court. They sought to have the actions of the RLB and of the Commission declared an inverse condemnation constituting an unconstitutional taking of property. This second state court action named as defendants the RLB and the Commission but not the individual members of those bodies. The state trial court found against the Delaneys on the constitutional issue, even though a judgment of foreclosure had been entered against the property (April 1977) some six months prior to entry of the state court judgment (September 1977). The state appellate court affirmed the lower court ruling in April 1979.

Plaintiffs' disputes with the city officials and the tenants' disputes with plaintiffs continued throughout 1975. In July 1975 the RLB found that the housing code violations upon which the rent rollbacks were based had been abated, and the RLB restored the "rolled-back" rents and granted the 4% rent increase which plaintiffs had requested more than a year before.

The tenants immediately objected. Additional hearings were held throughout the summer of 1975. At the hearings plaintiffs asserted and tenants disputed that the rollbacks and the denial of the 4% increase were causing plaintiffs severe financial hardship.

In the spring of 1975 plaintiffs stopped making mortgage payments on the property. In September 1975 the mortgagee instituted a foreclosure action in a New Jersey state court. A judgment of foreclosure was entered on April 18, 1977, and the property was sold shortly thereafter.

Plaintiffs filed the instant complaint on August 13, 1976. The named plaintiffs were the Delaneys, trading as the 290 Madison Corporation. At an early stage of the

litigation, when the case was before another judge in this district,[2] plaintiffs' counsel represented to that judge that the property was owned by the corporation and not by the Delaneys. Consequently, the complaint was amended to delete the Delaneys and add the corporation as the sole plaintiff. But, on the eve of the conclusion of trial (in September 1979) it emerged that the Delaneys, and not the corporation, held title to the property since 1972. Plaintiff corporation moved at that time to amend the complaint to add the Delaneys as plaintiffs. The Court granted the motion to amend under Fed.R.Civ.P.15(a)&(c).

In addition to all of the foregoing facts, the evidence adduced at trial established that plaintiffs depreciated the 466 Highland Avenue property (as well as most if not all of their other apartment buildings) using an accelerated method of depreciation. The use of accelerated depreciation methods, though perfectly lawful under the Internal Revenue Code, *see* I.R.C. § 167(b), has the effect of artificially inflating expenses and thereby creating, "on paper", a smaller net profit (or larger net loss) than an individual actually[3] incurs. *See generally* T. Fiflis & H. Kripke, *Accounting for Business Lawyers*, 211-14 (1971); Note, *Accelerated Depreciation and State Ratemaking Policy: The Case of California*, 31 Stan.L.Rev. 265, 267-70 (1979). On account of the use of an accelerated method of depreciation, plaintiffs' Highland Avenue property showed depreciation of approximately $209,000 for the period 1972-1977.

The evidence also established that plaintiff 290 Madison Corporation was nothing more than the *alter ego* of plaintiffs Delaneys, a true "shell" corporation. The De-

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2. The Honorable H. Curtis Meanor.

3. In terms of decreased revenues or increased out of pocket expenses.

laneys used the building's substantial depreciation as an expense for purposes of their personal income tax returns[4] and withdrew funds from its capital account just as if that account were their personal property.[5] In short, there was never a clear demarcation between the financial accounts and affairs of the individuals and those of their corporate creation, such that the creation never had an existence independent of and separate from its creators.

CONCLUSIONS OF LAW

A. *Res Judicata*

The law is well-established that the doctrine of res judicata applies as between state and federal court actions. In the leading case in this area the Supreme Court held:

> [I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court.

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 419 (1964). *Accord, New Jersey Education Association v. Burke*, 579 F.2d 764, 774-76 (3d Cir. 1978). The doctrine is fully applicable to § 1983 actions. *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973); *Bennun v. Board of Governors of Rutgers*, 413 F.Supp. 1274, 1278 (D.N.J. 1976). In addition, res judicata will bar

---

4. The corporation never filed an income tax return.

5. The most stunning example of this is the Delaneys' withdrawal of approximately $62,000 from the corporation when it received that sum as surplus proceeds from the mortgage recasting. The withdrawal left the corporation severely under-capitalized vis-a-vis the maintenance and repair of and mortgage payments on the building.

federal relief on a claim previously litigated in the state court even though the federal court defendants are different from the state court defendants. *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973); *Clem v. Cooper Communities, Inc.*, 344 F.Supp. 579, 586 (E.D.Ark. 1972); *Schmitt v. Jacobson*, 272 F.Supp. 301, 304 (D.Mass. 1967).

In the instant case the evidence established that plaintiffs' federal constitutional claim is practically indistinguishable from their state claim. To wit, in both fora plaintiffs have alleged that the actions of the RLB and the Commission in regulating the rents on their apartment building, allegedly causing the loss of the building through mortgage foreclosure, constitute an unconstitutional taking of property within due process of law. This claim was expressly considered and rejected by the New Jersey state courts. Accordingly, the Court concludes that the principle of res judicata bars any federal relief. That plaintiffs here sued the individual RLB and Commission members, whereas in the state courts they sued the RLB and Commission as wholes, does not affect this conclusion. *See Clem, supra*, 344 F.Supp. at 586.

My conclusion on the issue of res judicata is dispositive of this case. However, because plaintiffs were afforded (improvidently, it now appears in retrospect) a full trial on their claims, I deem it in the interests of judicial economy to address the merits of the case. *See generally id.*

B. *Causation*

It is established beyond the necessity for citation that a plaintiff has not proved that he has a cause of action unless he has proved that there was a concurrence of damage and wrong. The maxim is that damage without

wrong, or "damnum absque injuria", does not constitute a cause of action. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938); 1 Am. Jur. 2d *Actions* § 70 (1962). One logical inference from this maxim is that a plaintiff has the burden of proving that his injury was proximately caused by an act of the defendant. Another is that plaintiff must prove that defendant's actions constitute a legal wrong. For the reasons which follow the Court concludes that plaintiffs have failed to carry their burden.

Stripped to its essence, plaintiffs' complaint is that defendant officials' refusal to allow a 4% rent increase and to restore the $20 per month per apartment rollback directly caused plaintiffs economic losses resulting in mortgage foreclosure on the building.

While there can be little doubt that defendants' rent-regulating actions decreased the rate of return on plaintiffs' investment, this does not per se constitute an unconstitutional taking of property. Regulatory bodies enjoy wide discretion in limiting the rate of return on investments in areas which, like multiple dwelling housing, have long been regarded as in need of oversight and control. *See generally D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 466 F.2d 394, 418-23 (D.C.Cir.), *cert. denied*, 409 U.S. 1086 (1972). Only when a return from operations is confined to an amount below the point of confiscation does the specter of a constitutional violation appear. *See, e.g., Denver Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938). For purposes of analysis in the instant case the point of confiscation may be regarded as the loss of the building through mortgage foreclosure. Thus, only if plaintiffs had proved that defendants' regulatory actions proximately caused the foreclosure would plaintiffs have proved confiscation.

It is far from clear whether plaintiffs' loss of the building is fairly attributable to anything but their choosing to

maintain thin equity in the property. As note earlier, after the mortgage was recast, but while the property was still owned by the corporation, the Delaneys withdrew some $62,000 in surplus mortgage proceeds from the corporation. There is no evidence that this money was set aside in a capital account which could be tapped to make repairs or to meet mortgage payments in the event of decreased rental income and/or increased operating expenses. In addition, the Delaneys' failure assiduously to separate their personal income, expenditures and financial accounts from those of the building, and their use of the building's substantial depreciation deductions for their personal income tax benefit, compels the conclusion that, for purposes of determining whether the mortgage foreclosure was causally related to defendants' actions, the corporate and individual plaintiffs must be treated as a single business entity. This confluence of corporation and individuals is absolutely fatal to proof that defendants proximately caused the mortgage foreclosure, for the evidence established that the Delaneys had income from their other investments easily sufficient to meet the mortgage payments and thereby avoid foreclosure.[6]

Even assuming proof that defendants' actions caused the loss of plaintiffs' building, recovery would not necessarily follow, for the second requirement of the doctrine of "damnum obsque injuria" is proof that the complained of acts constitute a legal wrong. *Alabama Power, supra,* 302 U.S. at 479. This second requirement has also not been met.

Plaintiffs might have established legal wrong under the circumstances of this case by showing that defendants ap-

6. The fact that plaintiffs used accelerated depreciation, which has distorting effects on financial statements, *see* text at p. 6, *supra*, is another factor tending to belie plaintiffs' allegations of financial debilitation at defendants' hands.

plied the economic sanctions of the Rent Leveling Ordinance without cause and/or without affording plaintiffs a fair hearing. *See, e.g., Reilly v. Doyle,* 483 F.2d 123, 128 (2d Cir. 1973). Legal wrong cognizable under § 1983 is clearly not established by plaintiffs' showing that a portion of the ordinance was declared invalid under state law, absent proof that the ordinance was applied in a purposefully discriminatory manner. *See generally Baker v. McCollan,* 99 S.Ct. 2689 (1979); *Snowden v. Hughes,* 321 U.S. 1, 11 (1944); *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91, 102 (1st Cir. 1977).

Plaintiffs have not established that the sanctions of the Rent Leveling Ordinance were applied to them without cause. The evidence established that plaintiffs' apartment building was cited for 124 housing code violations in 1974 and that the tenants were constantly complaining to city officials concerning the lack of services and state of disrepair throughout the premises. The defendant officials responded to these complaints and to the housing code violations report by holding numerous hearings which, though at times tumultuous, met the minimum constitutional requirements of due process. *See, e.g., Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342 & n.7 (8th Cir. 1973). The economic sanctions were imposed after the hearings.

To summarize, the Court's conclusion is that even assuming *arguendo* that plaintiffs have proved proximate causation (a proposition earlier rejected), they have failed to prove that defendants' actions were taken for reasons other than to further the public interest. Plaintiffs have no ground to complain of a legal wrong or confiscation when government officials act to limit revenues in response to bona fide complaints of poor service. A similar complaint was considered and rejected in *D.C. Transit, supra,* where the owner of a bus system challenged the

Transit Commission's ratemaking as unconstitutional. The Court of Appeals said:

> Transit's argument has one central theme: its revenues cannot be permitted to fall below the level of fair return, and surely not below the breakeven point, no matter what the circumstances, and even if its management is uneconomical and inefficient and its service inadequate. If Transit is correct, the Commission is powerless to sanction corrective measures . . . . If Transit is correct, it may disregard its public responsibilities at will—as the Commission found that it has frequently done—and yet insist that the public respond to its demands for higher fares. We cannot accept that position. . . .
>
> The Due Process Clause strikes a balance between competing governmental and private interests at the point of reasonableness. Action rationally subserving a substantial governmental concern draws condemnation on due process grounds only if it is arbitrary or unreasonable.

466 F.2d at 422 (footnotes and citations omitted).

C. *Qualified Immunity*

Nonjudicial government officials who perform functions of an adjudicatory nature enjoy qualified immunity to § 1983 suits for damages. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 246-47 (1974). The Court concludes that the instant defendants are nonjudicial government officials who perform adjudicatory functions and who therefore are eligible to avail themselves of the protective umbrella or qualified immunity. *See Thompson v. Burke*, 556 F.2d 231, 236 (3d Cir. 1977); *Chase v. McMasters*, 573 F.2d 1011, 1019 (8th Cir. 1978); *Cameron v. Montgomery*

County Child Welfare Service, 471 F.Supp. 761, 766 (E.D. Pa. 1979).

The aforementioned immunity is "qualified" in the sense that two conditions must obtain in order for it to protect a particular defendant. First, the official must act without malice. Second, the official must not have known or reasonably cannot be expected to have known that his actions would violate plaintiffs' constitutional rights. *Wood, supra* at 322; *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61 (3d Cir. 1976); *Cameron, supra* at 766. Qualified immunity is not a presumption which plaintiffs must rebut but rather is an affirmative defense which must be pleaded and as to the elements of which, *see Skehan, supra* at 61, defendants have the burden of proof. *See id.; Cameron, supra* at 766. *See also O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975).

In the instant case defendants never formally pleaded qualified immunity. Nevertheless, the Court holds that the defense is properly considered because it was expressly raised by defendants' counsel in argument and evidence introduced in its support without objection by plaintiffs' counsel. This indicates that there was implied consent to trial of the issue. *See* Fed.R.Civ.P. 15(b); *Dell v. Heard*, 532 F.2d 1330, 1332 (10th Cir. 1976); 3 Moore's Federal Practice ¶ 15.13[2], at 165 (2d ed. 1979).

The Court concludes that defendants have established by a preponderance of the evidence that they pass the two-pronged test necessary to afford them immunity. First, there is no substantial evidence that any defendant acted with malice, *i.e.*, with the subjective intent to harm plaintiffs. *See Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Wood, supra*, 420 U.S. at 322. Second, the Court holds that because there is here lacking com-

pelling evidence that defendants' actions are causally related to plaintiffs' injury, *see* conclusions in part B, *supra*, defendants cannot logically be regarded as having had actual or constructive knowledge that the actions which they took within their spheres of official responsibility would violate plaintiffs' constitutional rights. *See id*. Accordingly, defendants are immune to plaintiffs' action for damages.

For all of the foregoing reasons plaintiffs are not entitled to recover damages for defendants. Each side to bear its own costs.

Counsel for the defendants shall submit an appropriate order within seven (7) days of the filing date of the within opinion.

Lawrence A. Whipple

LAWRENCE A. WHIPPLE,
U.S.D.J.

DATED: March 11th, 1980.

APPENDIX F

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DECIDED APRIL 6, 1979 ON DOCKET NO. A-3688-76

Argued March 26, 1979—Decided April 6, 1979

Before Judges Conford, Pressler and King.

On appeal from Superior Court, Chancery Division, Essex County.

Mr. Anthony M. Mahoney argued the cause for appellants 290 Madison Avenue Corporation and James and Helen Delaney, t/a 290 Madison Corp. (Messrs. Bernstein & Mahoney, attorneys; (Mr. Dennis M. Mahoney, on the brief).

Mr. Oliver R. Kovacs argued the cause for plaintiff/respondent Independence Savings Bank (Messrs. Kovacs, Anderson, Horowitz & Rader, attorneys).

Mr. Francis J. Dooley argued the cause for defendant-respondent Board of Commissioners of the City of Orange.

Mr. Alfonso C. Viscione argued the cause for defendant-respondent Rent Leveling Board of the City of Orange.

PER CURIAM

Judgment was entered in the Chancery Division against James Delaney and Helen Delaney ("Delaneys") in a foreclosure action by the plaintiff Independence Savings Bank ("Bank"). Consolidated for trial with that action were a prerogative writ action and a declaratory judgment action brought by the Delaneys against the City of Orange and the Orange Rent Leveling Board. In

the latter actions the Delaneys charged that certain resolutions by the latter two bodies in respect of rentals at a multi-unit apartment house owned by the Delaneys and heavily mortgaged to the Bank were invalid. Damages in the nature of condemnation were sought against these public bodies because, so the Delaneys charged, they lost the property by foreclosure as a result of the curtailment of rental income consequent upon the illegal actions of the governing body of the city and the rent board.

Insofar as the controversy between the Delaneys and the Bank is concerned, the Delaneys assert they had a binding agreement with the Bank at a certain point in the state of default on the mortgage that the Bank would not foreclose so long as all subsequent income from the property would be devoted either to operating expenses or to demands of the city and the rent board to make specified repairs to the property and provide specified services to the tenants—an agreement they say they kept. The trial judge found there was no such agreement and held the Bank entitled to foreclose. We find the judge's determination adequately supported by the evidence and affirm the judgment to that extent.

As to the actions of the rent board and the city the trial judge found for the Delaneys in part and against them in part. We need not discuss the merits of these rulings as they are moot unless the Delaneys' claim for damages against the public bodies is sustainable—a proposition we shall reject hereinafter. The Delaneys concede they cannot, as a practical matter, ever hope to recover from their former tenants such additional amounts of rent as would be theoretically due if the rent rulings adverse to the Delaneys were now to be reversed. They conceded at oral argument they do not intend to pursue any such claims.

We address the question of liability of the public bodies. The trial judge held there was no cause of action. The Delaneys argue that the illegal actions of those entities amounted to a constructive condemnation of their apartment house for which they should be awarded in damages the difference between the fair value of the property before and after the complained of resolutions of the municipal agencies. These consisted of denials of rent increases and a tax surcharge and of a $20 per tenant rollback in rents, later rescinded. For present purposes we will accept, *arguendo*, the validity of the attack upon the municipal actions. We conclude that there is no cause of action for constructive or inverse condemnation on these facts.

The Delaneys rely on *Washington Market Enterprises v. Trenton*, 68 *N.J.* 107 (1975). We find the decision inapposite. Apart from all the other differences in the nature of the respective governmental actions involved, the *Washington Market* case allowed a claim against the municipality only to the extent that the property owner could establish "substantial destruction" of the value of the property and that the city's activities played a substantial part in bringing that result about. *Id.* at 123. In the present instance the fee value of the property has not been substantially destroyed but only reduced. The Delaneys cannot come within the *Washington Market* principle merely because their thin equity in the heavily mortgaged property has been destroyed. We put to one side the question of the degree to which the Delaneys' own fault in undermaintaining the property contributed to their loss of the property.

Where there has not been a taking of private property, any incidental injury to property consequent upon the operations of government, including those of duly constituted regulatory bodies, is *damnum absque injuria*.

Washington Market Enterprises v. Trenton, supra, 78 *N.J.* at 117. This we find to be the case here. It does not matter that the regulations of rent control agencies may, in some situations, offend the principle that rents may not be kept below the level needed to afford the landowner a fair return. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200 (1978). The only legal redress therefor is the process of judicial review and such remedial relief as to the rent structure as may be afforded pursuant thereto. *Cf. N.J.S.A.* 59:2-3(a) and (b).

Judgment affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
Clerk

APPENDIX G

FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FILED SEPTEMBER 27TH, 1977, ON DOCKET NOS. C-239-74 AND L-29281-74 P.W.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION — ESSEX COUNTY
DOCKET NO. F-457-75
C-239-74
L-29281-74-PW

JAMES and HELEN DELANEY t/a
290 MADISON CORPORATION,

Plaintiffs,

vs.

THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE and THE RENT LEVELING BOARD OF THE CITY OF ORANGE,

Defendants,

and

INDEPENDENCE SAVINGS BANK, formerly known as SOUTH BROOKLYN SAVINGS BANK, a New York Corporation,

Plaintiff,

vs.

290 MADISON CORP., a New Jersey Corporation, et als,

Defendants

FINAL JUDGMENT

This matter having come before this Court on the application of the attorney for the Defendant, Orange Rent Leveling Board, (Alfonso C. Viscione, Esq.) and the City Attorney for the City of Orange, (Francis J. Dooley, Esq.), for an Order seeking a determination and adjudication as to liability, if any, to the plaintiffs of the aforesaid defendants for monetary damages, as the result of certain actions taken by the defendants, as governmental entities, which allegedly caused defendants to suffer certain losses and damages; and,

There appearing at this time in opposition to said application, the attorney for the plaintiffs, Bernstein & Mahoney, Esqs. (by Anthony Mahoney, Esq.); and,

This Court having presided at the trial of certain aspects of this suit, and having reviewed the Pleadings and Motion Papers and Orders on file in this matter, and having read the Briefs of the parties, and having heard the arguments of counsel in open Court, on April 26, 1977; and,

It appearing that both of these defendants are insulated from and immune from liability for monetary damages as governmental entities, pursuant to *N.J.S.A.* 59:2-1 et seq. IMMUNITY AND LIABILITY OF PUBLIC ENTITY, and the common law, and case law of this State; and,

This Court not having been persuaded that reasonable cause exists to impose liability for monetary damages upon the defendants; and,

The Court having considered the subject of the constitutionality of Section 10 of the Orange Rent Leveling Ordinance pertinent to and dealing with substantial compliance with maintenance codes as amended on January 15, 1974, Subject #1721 A 4 S 1, Number CG 1-74.

It is ORDERED this 27 day of September, 1977;

1. That portion of the plaintiff's suit seeking monetary damages from the City of Orange is herewith and the same stricken and denied.

2. That portion of the plaintiff's Complaint seeking monetary damages from the defendant, Rent Leveling Board of the City of Orange is herewith and the same stricken and denied.

3. That Section 10 of the Rent Leveling Ordinance of the City of Orange entitled "An Ordinance to Regulate, Control and Stabilize Rents and Create a Rent Control Board within the City of Orange (Number CG 97-72)" as adopted November 10, 1972 and as amended and supplemented thereafter as described herein on January 15, 1974; insofar as the latter has as its subject matter substantial compliance with the property maintenance of the City of Orange and the property maintenance of the State of New Jersey as a condition for a 4% rent increase and tax surcharge under Section 2 of the Ordinance is herewith and the same declared to be invalid, pursuant to the authority of *Modular Concepts, Inc. vs. South Brunswick Township, et al* and *Monmouth Mobile Home Owners' Association*, 146 N.J. Super. 138 (App.Div. January 12, 1977).

4. That the rollback granted by the Rent Leveling Board was valid for the period determined by the said Board's order of August 13, 1974 and was in effect until rescinded by the said Board effective January 1, 1976.

5. That all counsel confer with the Rent Leveling Board of the City of Orange within 10 days to determine and agree as to the present legal rentals for all the apartments in the subject premises consistent with the terms of this Order.

6. That in respect to any arrears that Plaintiff or Defendant Independent Savings Bank may be entitled to collect partier in consultations with said Board shall provide a reasonable period of time for payment. If no agreement can be reached then applications should be made to the Court to settle this matter.

/s/ Arthur C. Dwyer

ARTHUR C. DWYER, J.S.C.

THE TRANSCRIPT OF THE OPINION OF THE HONORABLE ARTHUR C. DWYER, SUPERIOR COURT OF NEW JERSEY, RENDERED FROM THE BENCH, APRIL 26TH, 1977, IN THE CONSOLIDATED MATTERS OF JAMES AND HELEN DELANEY, ET AL. VS. THE BOARD OF COMMISSIONERS OF THE CITY OF ORANGE AND THE RENT LEVELING BOARD OF THE CITY OF ORANGE, BEARING DOCKET NO'S. C.239-74 and L-29281-74-P.W.

* * *

(Commencing at 7.54-9)

DWYER, J.S.C.

There are before the Court a number of consolidated actions. On September 19, 1974 a Complaint was the basis of an Order to Show Cause signed by Judge Antell, sitting in Chancery, Docket Number C-239-74, entitled Delaney v. The Board of Commissioners and the Rent Leveling Board. The first count attacked the Resolution of the Board, dated August 13, 1974, refusing an increase in rents, an increase requested in May of 1974, effective August 1, 1974, and increases for garage space, refused, tax surcharge revenue increase denied on grounds improper allocations, illegal use of tax surcharge, $20 roll back for all tenants, retroactive to July 9, 1974, calculated on the rents as of July 1, 1973, and July 1, 1974, for those who had moved on and after (7.55) July 1; 1973.

The second count attacked the resolution of the Board of Commissioners dated August 26, 1974.

The third count attacked the Ordinance dated March 19, 1974, limiting rent increases to 4% per year and sought restraint of enforcement on September 25, 1974.

Antell transferred the matter to the Law Division, and on October 11, 1974, an order from Owens transferred it to the Chancery Division. On October 11th, order was signed by Judge Camarata, who sat in the Law Division, sending the matter back to the Board of Commissioners as an original appeal.

At that point the rent escrow account came into play. The reason the special account was created was so that plaintiffs would not have been deemed to have accepted leases automatically by cashing the rent checks at the rates that were being paid. They were reserving the right to a higher rent.

The next entry in that matter is dated June 15, 1976. It was an Order of Judge Blake, consolidating this matter with an action in lieu of prerogative writ, L-29821-74, filed on April 11, 1975, according to the records of the Court.

The first count appeals to the Commission, and (7.56) the action in denying it on January 27, 1975, charging unlawful application of Section X, which precludes rent raises of buildings not in substantial compliance with the Property Maintenance Code.

The relief requested is directed to the tenants to pay into escrow that which would be due, if not for the Rent Leveling Board action.

The second count, substantial compliance, creates arbitrary standards, and therefore, it is invalid, that section of the Ordinance.

The third count attacks the Rent Leveling Board Resolution of 12/10/74, that the plaintiff's calculations of rent surcharge, and it's an allegation, because of the Board's previous action, the tenants wouldn't pay, they want relief, directing the tenant to pay.

On September 12, 1975, there is a motion to vacate an Order of Judge Thompson that had been signed on July 31, 1975, and that Order basically was a direction to have the tenant pay all of the rent, including the increase into escrow, but directing the City to collect the rent in this situation, and I believe the City came in to vacate that Order on the grounds they had no authority to collect rent, and they wanted no part of it. That, again, got back into (7.57) the rent escrow problem.

On June 10, 1975, there was an answer by the Rent Leveling Board, basically a general denial and pleading that it was barred by the forty-five-day Rule under Section 4.69.

The Answer of the Board of Commissioners is the general denial and pleading the forty-five day Rule.

On November 19, the two were consolidated, there was a motion to consolidate it on June 15, 1976. It was consolidated by Blake.

There is a Pre-Trial on July 23, 1976.

So far as I know, that is the history of the relevant litigation between the plaintiffs and the defendants.

There was no Resolution in the Chancery action. Basically it was being treated as an action in lieu of prerogative writ.

I could recite some additional history in here concerning the Complaint and foreclosure, but I don't think that that's necessary for purposes of this Resolution this afternoon.

The matter being decided now pertains to one of the three consolidated actions, arising out of the impact of the Rent Leveling Ordinance, adopted November 10, 1972 by the City of Orange, on an (7.58) apartment house owned by the defendant, 290 Madison Avenue

Corporation, a New Jersey Corporation, hereinafter "owner," which in turn is owned by James and Helen Delaney.

It is an action in lieu of prerogative writ, started by a complaint filed, according to the records of this Court, on April 11, 1975, by James and Helen Delaney against the Board of Commissioners of the City of Orange, hereinafter "Orange," and the Rent Leveling Board of Orange, a Board created by Ordinance of the City of Orange, hereinafter "R.L.B."

The relief demanded basically is the declaration that certain Resolutions of the Rent Leveling Board be declared invalid, and that the action of the Rent Leveling Board in enforcing Section X of the Rent Leveling Board Ordinance that requires the landlord to show substantial compliance with the Property Maintenance Code in Jersey Law prior to relief being granted is arbitrary and capricious according to the Complaint.

There is no demand in that Complaint for monetary damages.

The Answers were denial, and that action was duplicate of an earlier action.

At this point the court refers to the action (7.59) known as Independent Savings Bank vs. Delaney and 290 Madison Avenue Corporation, where the foreclosure of a mortgage held by Independent Savings Bank against the apartment house at 466 Harrison Avenue, owned by Owner.

It is the Court's recollection that the Delaneys had no personal liability on the note or mortgage.

The Court has heretofore found in that action that there was a valid moratorium agreement worked out by which Independent Savings, when there was a deficit of

five months payment in March of 1975, had agreed with Owner, and really the Delaneys, that upon Owner making two immediate payments, and thereafter making one payment per month would not foreclose until the rent leveling problem were worked out.

The agreement as stated was reached in March, 1975.

The foreclosure was started in September, or at the very end of August, 1975, when Owner failed to make the August, 1975 payment.

There are also substantial payments made by the Independence Savings Bank to protect its interest in the property, which, of course, were added to the principal of the mortgage, and in that action there was a counterclaim for damages for the loss of the value of the equity based upon the breach of contract, (7.60) or the loss of profit from the building, that matter having been resolved against the Owner, the Court having found that the Owner did not live up to the terms of the moratorium agreement, and Independent was free to commence its action, the claim based upon a breach of contract damage is out.

The owner now is asserting a claim for damages against Governmental units in Orange and the R.L.B. No useful purpose would be served by repeating the tangled history of the stormy sessions at the Rent Leveling Board or in the Commission Hearings of Orange, or otherwise, that are reflected in the voluminous documents that have been submitted to the Court on various motions and filed pursuant to certain stipulations that have been worked out.

The thrust of Owner's action is to attempt to get sufficient funds to redeem it, or before the foreclosure sale.

Under Paragraph 7 of the Pre-Trial Order, dated July 23, 1976, it is stated, "Damages against Mortgagee for lost profits."

And under Section 5, "Right to foreclose and right to prerogative writ relief and damages will be determined by Court at trial."

Then counsel for the Delaneys and Owner noted (7.61) over his signature, "Under protest for failure to include damages as set forth in the pleadings."

After review of all of the pleadings, no pleadings join the individual members of the Governmental units. No pleading asserts the claim against any individual for damages.

It is the Court's recollection that there is no claim for damages asserted against the Governmental units, but to resolve the question of who Owner or Delaneys can have a cause of action against, either Governmental units for money damages.

The Court accepted the motion of Orange and the Rent Leveling Board to move as a matter of law that no such cause of action existed, and certainly that none was stated within the Pre-Trial Order or the preceding pleadings.

Owner correctly starts from the premise that Rent Leveling Board Ordinances cannot be used to confiscate the property of landlords.

Troy Hill Village v. Parsippany-Troy Hills Township Council, 68 N.J., 604, 1975, and the related cases decided simultaneously by the Supreme Court.

Owner also correctly asserts that the Courts will grant relief from improper application of said Ordinances.

(7.62) Finally, the Owner is also correct that Section 10 of the Rent Leveling Ordinance appears to be unconstitutional under the *Modular Concept Inc. v. South Brunswick Township and South Brunswick Township Committee,* in New Jersey Super, at pages to be

assigned, Appellate Division, 1977, approved for publication January 21, 1977, and subsequently in hindsight, certain acts the Rent Leveling Board and the Commission may be thought of as being improper in light of recent decisions.

However, there is a difference between taking property and enforcing an Ordinance that has the effect of inflicting economic loss on individuals as suggested by Orange and the Rent Leveling Board in their respective arguments in the brief.

The Court distinguishes *Washington Market Enterprises vs. Trenton*, 68 N.J., 107, 1975, and *Lowmark v. The Mayor and Council of Englewood*, 51 N.J., 108, a 1967 case.

In the latter, the Town was acquiring an interest in the subject property for its own benefit, and the Supreme Court said it had to pay for the interest which it acquired, namely an option on the property for one year.

In the *Washington Market* case, the Supreme Court (7.63) held that by its long period of announcing of taking all property in the declared blighted area, and taking many of said properties, City may have inflicted damages upon plaintiff, such as plaintiff should be allowed to show that losses occurred, and that the City did not have to condemn the property.

It analogized the situation to that in *Board of Education v. Morristown, v. Palmer*, 88 N.J. Super, 378, reversed as premature, 46 N.J., 522, 1966, where the Board of Education claimed that the State so damaged the premises of the school that it would be unable to utilize the property, and therefore the State should be compelled to condemn it.

In this case, the focus historically has been that those who are charged with enforcing law or indeed adopting

law, must be free to act without fear of being liable if they are wrong as a matter of judgment for discretion, where they act in good faith, 57 *Am. Jur.*, Municipal Section on Torts and Liability, Section 116, Invalid Ordinances.

Courts generally advance the reasoning that in passing and enforcing the Ordinances, the Municipality is acting in the Governmental capacity, and is therefore within the Rule of Governmental immunity.

Thus, a Municipal corporation is not liable to the (7.64) street railway company for losses sustained as a result of enforcement of an Ordinance fixing reduced rates.

City of Seattle v. The Light Company, 103 Washington, 41, 174 Pacific, 464, Supreme Court, 1968, wherein the Court held that the defendant could not offset against claim for franchise taxes and losses sustained during period of validity of Ordinance. See the discussion at Page 467.

There, I think there is a discussion from the Federal case referred to by Mr. Dooley.

In *Visador Corporation v. Cliffside Park*, 48 N.J., 214, 1966, the Supreme Court held that a restaurant owner could not collect money damages from a Municipality which had illegally installed a one-way-street system that reduced the traffic flow and patrons into the restaurant and caused losses.

Page 219, Justice Jacobs, writing for a unanimous Court, said when Congress provided for a wide allowance of tort claims against the Government, it specifically excluded inter alia claims based on acts or omissions of Governmental employees excercising due care in the execution of a Statute or Regulation, whether or not such

Statute or Regulation be valid, or based upon the exercise of performance or the (7.65) failure to exercise the performance of a discretionary function or duty, 28 U.S.C.A., Section 2680.

See Harper and James Super, Section 29.143, Davis, Administrative Law, Section 25.08, 1958, Prosser, Section 125, Page 999, and *DePru v. United States*, 247 F.2d, 819, 3rd Circuit, 1957, the Court applied this exclusion in support of its rejection of the damage claim based upon the company's allegedly wrong refusal to issue security clearances to the plaintiff.

In the course of his opinion, the Judge noted that the Federal Torts Claim Act did not contemplate "A remedy for damages sustained by reason of the application of invalid laws or Regulations," 247 F.2d, at Pages 824 and 825.

The Court will not read the rest of that opinion, except to point out that Page 221, the Municipalities have been festered with broad regulatory powers for the advancement of the public health safety or welfare.

These, of course, encompass customary traffic regulations, including the destination of one-way streets. If the Bureau had proceeded through an approved Ordinance designated Marion Avenue as a one-way street, there presumably would have been the economic business loss that society would rightfully (7.66) expect the visitor to bear such loss without recourse. That much is not disputed by visibility.

The claim is, however, since here the Bureau did not supersede the liability of its action, a sufficient basis on which to support the damage claimed.

If this appeal were accepted, the damages could be recovered from a Municipality whenever there was a

showing from a Municipal Zoning Licensing or other restrictions later declared invalid. The absence of any right to such damages has been generally assumed in our State.

There are Law Reports that are full of proceedings for the setting aside of restrictive Municipal Ordinances and Resolutions and none so far as we know has ever been accompanied or followed by any damages recovered.

Elsewhere, the Courts for policy reasons expressly denied such recovery with substantial case history.

It goes on to point out that despite the tendency to remove sovereign immunity, this particular area of immunity, based upon the exercise of judgment and discretion in the enforcement of an Ordinance, even if it be involved, seems to remain, and for policy reasons in the Democratic society, that unless it remains to be impossible for anyone to assume the burden of an office (7.67) that required the exercise of judgment and discretion.

I cite also, and I want you to compare it, *Valentine v. Englewood*, 76 N.J.L., 509, E & A, 1908, no liability for members of the Board of Health for quarantining an individual where in fact it subsequently developed there was no epidemic situation.

The Legislature in enacting the Tort Claims Act has expressly preserved these concepts of immunity, and N.J.S.A. 59:2-3, relating to discretionary activities, and the Court will not read them into the record.

See also *Gerard v. Alvarez*, 144 N.J. Super, 259, 1976. There, the Appellate Division said there can be no liability that the immunity applies to the Zoning Board, that simply had refused to act upon an application for zoning under the Tort Claims Act.

The Municipality in acting in these areas is not acting for its own benefit, taking property for its own corporate

purposes, but is acting for the general good of the public, as Acting Justice Conford stated in the series of cases that the Supreme Court sustained the Rent Leveling Ordinances, persons who serve on such Boards serve without pay, and to hold them liable for error in judgment as a practical matter eliminated rent control, although some persons are paid today (7.68) some salaries, to hold them liable for errors of judgment, or wrong interpretations of law in applying the Laws governing appeals, again, as a practical matter, would bring an end to our present system of Democratic Government, there being no allegations of fraudulent conduct, but only problems arising from implied Section 10, which now has been declared to be unconstitutional.

The Court concludes that there is no liability for the reasons stated above.

I think the only thing that that leaves in effect was relief should be granted based upon the Resolutions, and in light of the *Modular Concept* case, I would suggest that one thing counsel might do is see if they cannot stipulate and work out what that would be. Otherwise, what you'll have to do is establish the record out of this myriad of documents that we have and supplement it from that point of view.

All right, Mr. Dooley, you'll prepare an Order.

MR. DOOLEY: Yes, Your Honor.

THE COURT: The defendants are not entitled to costs with respect to that.

* * *

CERTIFICATE

I, CHARLES J. TRAMER, JR., OFFICIAL COURT REPORTER and CERTIFIED SHORTHAND REPORTER, hereby certify the foregoing to be a true and accurate transcript of the above-entitled matter, as taken by me stenographically, according to the best of my knowledge and ability.

/s/ Charles J. Tramer, Jr., C.S.R.

CHARLES J. TRAMER, JR., C.S.R.
Official Court Reporter

Dated: